

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 31, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NICHOLAS B.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 4:21-CV-5159-JAG

ORDER GRANTING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 15, 20. Attorney Tree represents Nicholas B. (Plaintiff); Special Assistant United States Attorney McClain represents the Commissioner of Social Security (Defendant). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and **REMANDS** the matter for further proceedings under sentence four of 42 U.S.C. § 405(g).

I. JURISDICTION

Plaintiff filed an application for benefits on May 4, 2019, alleging disability since June 1, 2011. The application was denied initially and upon reconsideration. Administrative Law Judge (ALJ) Mark Kim held a hearing on December 23, 2020, and issued an unfavorable decision on January 22, 2021. Tr. 120-127. The

1 Appeals Council subsequently remanded the matter. Tr. 138-42. The ALJ held a
2 second hearing on June 23, 2021, and issued an unfavorable decision on August 2,
3 2021. Tr. 16-32. The Appeals Council denied review on October 28, 2021. Tr. 1-
4 6. Plaintiff appealed this final decision of the Commissioner on December 28,
5 2021. ECF No. 1.

6 II. STANDARD OF REVIEW

7 The ALJ is responsible for determining credibility, resolving conflicts in
8 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
9 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
10 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
11 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
12 only if it is not supported by substantial evidence or if it is based on legal error.
13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
14 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
15 1098. Put another way, substantial evidence is such relevant evidence as a
16 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
17 *Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305
18 U.S. 197, 229 (1938)).

19 If the evidence is susceptible to more than one rational interpretation, the
20 Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
21 1098; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).
22 If substantial evidence supports the administrative findings, or if conflicting
23 evidence supports a finding of either disability or non-disability, the ALJ's
24 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
25 Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set
26 aside if the proper legal standards were not applied in weighing the evidence and
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1 making the decision. *Browner v. Sec’y of Health and Human Services*, 839 F.2d
2 432, 433 (9th Cir. 1988).

3 III. SEQUENTIAL EVALUATION PROCESS

4 The Commissioner has established a five-step sequential evaluation process
5 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
6 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). At steps one through
7 four, the claimant bears the burden of establishing a prima facie case of disability.
8 *Tackett*, 180 F.3d at 1098-99. This burden is met once a claimant establishes that a
9 physical or mental impairment prevents the claimant from engaging in past
10 relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot
11 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to
12 the Commissioner to show (1) the claimant can make an adjustment to other work
13 and (2) the claimant can perform other work that exists in significant numbers in
14 the national economy. *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a
15 claimant cannot make an adjustment to other work in the national economy, the
16 claimant will be found disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

18 IV. ADMINISTRATIVE FINDINGS

19 On August 2, 2021, the ALJ issued a decision finding Plaintiff was not
20 disabled as defined in the Social Security Act.

21 At **step one**, the ALJ found Plaintiff had not engaged in substantial gainful
22 activity since May 4, 2017, the application date. Tr. 20.

23 At **step two**, the ALJ determined Plaintiff had the following severe
24 impairments: autism spectrum disorder; borderline intellectual disability; and
25 social anxiety disorder. Tr. 20.

26 At **step three**, the ALJ found these impairments did not meet or equal the
27 requirements of a listed impairment. Tr. 21.

1 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and
 2 determined Plaintiff could perform a full range of work at all exertional levels
 3 subject to the following nonexertional limitations: he is able to perform simple,
 4 routine tasks with a Specific Vocational Preparation of 2 or less; he is able to
 5 perform work involving only occasional job-related decision making and
 6 occasional and simple changes; he is able to perform work not involving fast-paced
 7 type tasks, and work involving no interaction with the public and only occasional
 8 and superficial interaction with coworkers not involving tandem tasks. Tr. 24.

9 At *step four*, the ALJ found Plaintiff has no past relevant work. Tr. 31.

10 At *step five*, the ALJ found there are jobs that exist in significant numbers in
 11 the national economy that Plaintiff can perform. Tr. 31.

12 The ALJ thus concluded Plaintiff was not disabled from May 4, 2017.
 13 Tr. 32.

14 V. ISSUES

15 The question presented is whether substantial evidence supports the ALJ's
 16 decision denying benefits and, if so, whether that decision is based on proper legal
 17 standards.

18 Plaintiff raises the following issues for review: (1) whether the ALJ erred by
 19 "abusing his discretion and denying the claimant in failing to call a medical expert
 20 to develop the record in accordance with the Appeals Council order"; (2) whether
 21 the ALJ improperly evaluated the medical opinion evidence; (3) whether the ALJ
 22 erred by discounting Plaintiff's testimony; (4) whether the ALJ erred at step three;
 23 (5) whether the ALJ erred at step five. ECF No. 15 at 6.

24 VI. DISCUSSION

25 A. Appeals Council Order.

26 Plaintiff argues the "abus[ed] his discretion and den[ied] [Plaintiff] due
 27 process in failing to call a medical expert in accordance with the Appeals Council
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1 order.” ECF No. 15 at 8. However, the Appeals Council did not mandate the
2 calling of a medical expert. Rather, the Appeals Council stated: “If warranted, the
3 Administrative Law Judge *may* obtain testimony from a medical expert.” Tr. 140
4 (emphasis added). The Court discerns no error on the ALJ’s part in this exercise of
5 discretion.

6 **B. Medical Evidence.**

7 Under regulations applicable to this case, the ALJ is required to articulate
8 the persuasiveness of each medical opinion, specifically with respect to whether
9 the opinions are supported and consistent with the record. 20 C.F.R. §
10 416.920c(a)-(c). An ALJ’s consistency and supportability findings must be
11 supported by substantial evidence. *See Woods v. Kijakazi*, 32 F.4th 785, 792 (9th
12 Cir. 2022).

13 Plaintiff contends the ALJ misevaluated two medical opinions. ECF No. 15
14 at 9-15. The Court addresses each in turn.

15 **1. Philip Barnard, Ph.D.**

16 Dr. Barnard examined Plaintiff on March 21, 2017, conducted a clinical
17 interview, and assessed Plaintiff’s mental impairments would, among other things,
18 markedly impair his ability to understand, remember, and persist in tasks by
19 following detailed instructions, perform routine tasks without special supervision,
20 adapt to changes in a routine work setting, ask simple questions or request
21 assistance, communicate and perform effectively in a work setting, and maintain
22 appropriate behavior in a work setting. Tr. 474. Dr. Barnard assessed Plaintiff’s
23 “overall severity” as “marked.” Tr. 474. The ALJ found Dr. Barnard’s opinion
24 “unpersuasive.” Tr. 29.

25 The ALJ first discounted Dr. Barnard’s opinion on the ground it is “not
26 supported by nor consistent with the medical evidence and record as a whole.” Tr.
27 29. An ALJ’s rejection of a clinician’s opinion on the ground that it is contrary to
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1 unspecified evidence in the record is “broad and vague,” and fails “to specify why
2 the ALJ felt the [clinician’s] opinion was flawed.” *McAllister v. Sullivan*, 888 F.2d
3 599, 602 (9th Cir. 1989); *see also Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
4 1998) (rather than merely stating his conclusions, an ALJ “must set forth his own
5 interpretations and explain why they, rather than the doctors’, are correct”) (citing
6 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). It is not the job of the
7 reviewing court to comb the administrative record to find specific conflicts.
8 *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014). The ALJ accordingly
9 erred by discounting Dr. Barnard’s opinion on this ground.

10 The ALJ next discounted Dr. Barnard’s opinion on the ground the doctor
11 “did not have any history or experience treating the claimant for the diagnoses
12 assessed.” Tr. 29. However, the Commissioner’s regulations expressly allow for
13 the evaluation of examining sources’ opinions. *See* 20 C.F.R. § 404.1520c(3)(v)
14 (“*Examining relationship*. A medical source may have a better understanding of
15 your impairment(s) if he or she examines you than if the medical source only
16 reviews evidence in your folder.”). Indeed, the Appeals Council, in its remand
17 order, specifically instructed the ALJ to “[o]btain additional evidence concerning
18 the claimant’s mental impairments in order to complete the administrative record
19 in accordance with the regulatory standards regarding *consultative examinations*
20 and existing medical evidence[.]” Tr. 140 (emphasis added). To exclude a
21 doctor’s opinion on this ground would, necessarily, allow for the exclusion of all
22 examining providers’ opinions. The ALJ accordingly erred by discounting Dr.
23 Barnard’s opinion on this ground.

25 The ALJ also discounted Dr. Barnard’s opinion on the ground the doctor
26 “appears to have relied heavily on the claimant’s self-reports of limitations, as the
27 opinion narrative essentially describes the claimant’s self-reported history,
28 symptoms and problems without indicating much in the way of clinical, objective

1 exam findings or testing to support the degree of disabling mental limitations
2 opined.” Tr. 29. On this record, this is not a valid ground to discount an opinion
3 concerning Plaintiff’s mental impairments: “Courts have recognized that a
4 psychiatric impairment is not as readily amenable to substantiation by objective
5 laboratory testing as is a medical impairment and that consequently, the diagnostic
6 techniques employed in the field of psychiatry may be somewhat less tangible than
7 those in the field of medicine.

8 In general, mental disorders cannot be ascertained and verified as are most
9 physical illnesses, for the mind cannot be probed by mechanical devices in order to
10 obtain objective clinical manifestations of mental illness.” *Lebus v. Harris*, 526 F.
11 Supp. 56, 60 (N.D. Cal. 1981). The record indicates the opinion was based on
12 clinical observations and does not indicate Dr. Barnard found Plaintiff to be
13 untruthful. Therefore, this is no evidentiary basis for rejecting the opinion. *Cf.*
14 *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (“The report of a
15 psychiatrist should not be rejected simply because of the relative imprecision of the
16 psychiatric methodology.

17
18 Psychiatric evaluations may appear subjective, especially compared to
19 evaluation in other medical fields. Diagnoses will always depend in part on the
20 patient’s self-report, as well as on the clinician’s observations of the patient. But
21 such is the nature of psychiatry. Thus, the rule allowing an ALJ to reject opinions
22 based on self-reports does not apply in the same manner to opinions regarding
23 mental illness.”) (cleaned up). To the extent the ALJ contrasted Dr. Barnard’s
24 opinion as inconsistent with treatment notes indicating Plaintiff was “doing well”
25 and “‘functional’ in activities of daily living,” the ALJ omitted an important fact:
26 Plaintiff’s treatment notes indicate Plaintiff was “functional at *home*.” *See, e.g.*,
27 Tr. 526 (emphasis added).
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1 There is, of course, a meaningful difference between functioning well at
2 home and functioning in the workplace.¹ When evaluating medical evidence, an
3 ALJ must present a rational and accurate interpretation of that evidence. *See*
4 *Reddick v. Chater*, 157 F.3d 715, 722–23 (9th Cir. 1998) (reversing ALJ’s decision
5 where his “paraphrasing of record material is not entirely accurate regarding the
6 content or tone of the record”). Further, the ALJ must evaluate the medical
7 evidence “with an understanding of the patient’s overall well-being and the nature
8 of [his] symptoms.” *Attmore v. Colvin*, 827 F.3d 872, 877 (9th Cir. 2016). Because
9 the ALJ did not do so, he necessarily erred by discounting Dr. Barnard’s opinion
10 on this ground.

11 Finally, the ALJ discounted Dr. Barnard’s opined marked limitations as
12 internally inconsistent with his assessment of Plaintiff’s communication difficulties
13 and Plaintiff’s “appearance, hygiene/grooming, speech, attitude and behavior and
14 affect.” Tr. 29-30. This is not a reasonable inconsistency. Plaintiff’s performance
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16 ¹As examples of Plaintiff’s “activities of daily living,” the ALJ noted Plaintiff,
17 among other minimal activities, “can do personal care, play games on his computer
18 and takes care of dogs[.]” Tr. 28. These minimal activities neither “meet the
19 threshold for transferable work skills,” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
20 2007) (citing *Fair*, 885 F.2d at 603), nor undermine Dr. Barnard’s opinion, *see*
21 *Diedrich v. Berryhill*, 874 F.3d 634, 643 (9th Cir. 2017) (“House chores, cooking
22 simple meals, self-grooming, paying bills, writing checks, and caring for a cat in
23 one’s own home, as well as occasional shopping outside the home, are not similar
24 to typical work responsibilities.”); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
25 1998) (“Several courts, including this one, have recognized that disability
26 claimants should not be penalized for attempting to lead normal lives in the face of
27 their limitations.”).
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1 during his clinical interview with Dr. Barnard – conducted in a close and sterile
 2 setting with a psychiatric professional – is not reasonably inconsistent with Dr.
 3 Barnard’s opined limitations concerning Plaintiff’s ability to, among other things,
 4 perform effectively in a work setting, ask simple questions, and request assistance.
 5 Tr. 474. The ALJ accordingly erred by discounting Dr. Barnard’s opinion on this
 6 ground.

7 The ALJ accordingly erred by discounting Dr. Barnard’s opinion.

8 **2. Kishore Varada, PA-C.**

9 PA-C Varada, Plaintiff’s treating provider, prepared a “mental residual
 10 functional capacity assessment” on June 21, 2021, wherein he assessed a series of
 11 severe and marked limitations and opined Plaintiff would be off-task less than 12%
 12 and would miss 4 or more days per month if attempting to work a 40-hour
 13 workweek. Tr. 537-40. The ALJ found this opinion “unpersuasive.” Tr. 30.

14 The ALJ first discounted the opinion on the ground it appeared “on a
 15 checkbox rating form with no supporting clinical evaluation notes or testing and
 16 only minimal explanation ... for the extreme limitations opined.” Tr. 30.
 17 However, the record makes clear that PA-C Varada had treated Plaintiff for a
 18 period of years before rendering this opinion. *See* Tr. 487-96 (2016-2017), 499-
 19 536 (2017-2020). Indeed, the ALJ acknowledges PA-C Varada as a “[t]reating
 20 provider.” Tr. 30. Following years of treatment notes in the record, PA-C Varada’s
 21 checkbox opinion “did not stand alone[.]” *Garrison v. Colvin*, 759 F.3d 995, 1014
 22 n17 (9th Cir. 2014). The ALJ accordingly erred by discounting it on this ground.

24 The ALJ next discounted the opinion as inconsistent “with the longitudinal
 25 record, including claimant’s presentation and performance on mental status
 26 screenings in treatment records/progress notes and on consultative psychological
 27 evaluation, previously discussed, which indicate some functioning limits due to
 28 autism, borderline intellect and/or social anxiety but otherwise within normal and

1 not to the extent of being entirely work preclusive.” Tr. 30. As discussed above,
2 in the context of Dr. Barnard’s opinion, these are unreasonable inconsistencies.
3 The ALJ accordingly erred by discounting the opinion on this ground.

4 Finally, the ALJ discounted the opinion on the ground it was internally
5 inconsistent: “the provider’s overall severity rating opined (extreme limitation in
6 most categories meaning inability to perform basic work-related activities) is not
7 consistent with the estimate of claimant’s time off-task (only less than 12 percent
8 of the workweek).” Tr. 30. Substantial evidence does not support this finding.
9 The ALJ’s cursory finding fails to sufficiently explain *how* this is a reasonable
10 inconsistency, *see Reddick*, 157 F.3d at 725, or how the overall severity rating is,
11 categorically, mutually exclusive with the opined estimate of time spent off-task.
12 The ALJ accordingly erred by discounting the opinion on this ground.

13 **C. Plaintiff’s Testimony.**

14 Plaintiff contends the ALJ erroneously discounted his testimony. ECF
15 No. 15 at 16-19. Where, as here, the ALJ determines a claimant has presented
16 objective medical evidence establishing underlying impairments that could cause
17 the symptoms alleged, and there is no affirmative evidence of malingering, the
18 ALJ can only discount the claimant’s testimony as to symptom severity by
19 providing “specific, clear, and convincing” reasons supported by substantial
20 evidence. *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). The Court
21 concludes the ALJ failed to offer clear and convincing reasons to discount
22 Plaintiff’s testimony.

24 The ALJ discounted Plaintiff’s testimony as inconsistent with the medical
25 evidence. Tr. 25-27. However, because the ALJ erred by discounting two medical
26 opinions, and necessarily failed to properly evaluate the medical evidence, as
27 discussed above, this is not a valid ground to discount Plaintiff’s testimony. The
28 ALJ accordingly erred by discounting Plaintiff’s testimony.

VII. CONCLUSION

This case must be remanded because the ALJ harmfully misevaluated the medical evidence and Plaintiff's testimony. Plaintiff contends the Court should remand for an immediate award of benefits. Such a remand should be granted only in a rare case and this is not such a case. The medical opinions and Plaintiff's testimony must be reweighed and this is a function the Court cannot perform in the first instance on appeal. Further proceedings are thus not only helpful but necessary. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (noting a remand for an immediate award of benefits is an "extreme remedy," appropriate "only in 'rare circumstances'") (quoting *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014)).

Because the ALJ misevaluated the medical evidence and Plaintiff's testimony, the ALJ will necessarily need to make new step three findings, which were based on the ALJ's assessment of both the medical evidence and Plaintiff's testimony, and determine whether the RFC needs to be adjusted. For this reason, the Court need not reach Plaintiff's remaining assignments of error. *See PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("[I]f it is not necessary to decide more, it is necessary not to decide more.") (Roberts, J., concurring in part and concurring in the judgment).

On remand, the ALJ shall develop the record, as needed; reconsider the opinions of Dr. Barnard and PA-C Varada; reassess Plaintiff's testimony; and reevaluate the remaining steps of the sequential evaluation, as appropriate.

Having reviewed the record and the ALJ's findings, the Commissioner's final decision is **REVERSED** and this case is **REMANDED** for further proceedings under sentence four of 42 U.S.C. § 405(g).

Therefore, **IT IS HEREBY ORDERED:**

1 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
2 **GRANTED.**


3 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
4 **DENIED.**

5 3. The District Court Executive is directed to file this Order and provide
6 a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for
7 Plaintiff and the file shall be **CLOSED.**

8 **IT IS SO ORDERED.**

9 DATED March 31, 2023.





JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE